Vanport Sand and Gravel, Inc. *and* Construction General Laborers and Material Handlers Local Union 964 a/w Laborers International Union of North America, AFL-CIO. Case 6-CA-15341

25 June 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 January 1984 Administrative Law Judge Peter E. Donnelly issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

[1] See 267 NLRB 150 (1983). Chairman Dotson did not participate in that decision which reversed the judge and concluded that alleged discriminatee Fabich was not a supervisor.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In *NLRB v. City Disposal Systems*, 115 LRRM 3193 (1984), the Supreme Court recently upheld the Board's application of the *Interboro* doctrine as applied to the facts of that case. That doctrine holds that "an individual's assertion of a right grounded in a collective bargaining agreement is recognized as concerted activity and therefore accorded the protection of § 7." *City Disposal Systems*, supra at 3196. See *Interboro Contractors*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). We find that the record supports the judge's reliance on this doctrine in resolving the instant case. We note that the Respondent concedes that Fabich's 28 December 1981 grievance relates to contract provisions.

The record discloses that between 24 December 1981 and 1 February 1982 a less senior employee performed work usually performed by employee Fabich. Art. 9 of the collective-bargaining agreement provides in pertinent part that "[d]uring *slow periods* and *layoffs*, seniority shall prevail at all times." (Emphasis added.) Thus, when Fabich filed his 3 February grievance protesting the Respondent's use of a less senior employee to perform his work while he was off, Fabich was asserting a right grounded in the collective-bargaining agreement. This same result obtains whether we apply the judge's characterization of Fabich's time off as "vacation paid layoff" or the Respondent's characterization of this period as "vacation scheduled during the slow season." Either characterization places Fabich's "off" time within the ambit of the operative contractual language. Nor does the Respondent's contention that Fabich was off between 24 December and 1 February pursuant to an agreement between the Respondent and the Union to eliminate accrued vacation time deprive Fabich's 3 February grievance of its contractual basis. The record indicates that during contract negotiations the Respondent and the Union bargained over the issue of accrued vacation time. However, art. 5, sec. 2, which apparently reflects any agreement reached regarding the issue of accrued vacation time, undercuts the Respondent's position. Art. 5, sec. 2, provides "vacation not taken shall be paid in full upon winter *layoff* each year." (Emphasis added.)

Accordingly, we find that the Respondent's discharge of Fabich was prompted by his filing of written grievances and that those grievances asserted rights grounded in the collective-bargaining agreement. We therefore adopt the judge's finding that the Respondent's discharge of Fabich was in violation of Sec. 8(a)(1) of the Act.

In adopting the judge, we do not adopt his characterization of the Respondent's proferred reasons for discharging Fabich as inconsequential. Rather, we find that the General Counsel established a prima facie case that the Respondent violated the Act and the Respondent did not show it would have taken the same action in the absence of the protected activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Vanport Sand and Gravel, Inc., Edinburg, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. By decision dated December 13, 1982, the complaint in the instant case was dismissed by me concluding that Phillip M. Fabich, the alleged discriminatee herein, was a supervisor within the meaning of Section 2(11) of the Act. By Decision and Order dated August 15, 1983 (267 NLRB 150), a three-member panel of the Board reversed that finding, concluding that Fabich was not a supervisor, and remanded the case for consideration on the merits of the unfair labor practice allegation of the complaint. Fabich's discharge is the only unfair labor practice alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the production and sale of sand and gravel aggregates with its principal office and sole facility located in Edinburg, Pennsylvania. During the 12-month period ending March 31, 1982, Respondent purchased and received at its Edinburgh, Pennsylvania facilities goods and services valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The complaint alleges, Respondent in its answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent at the hearing admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*[1]

Respondent is engaged in the processing of sand and gravel at a jobsite in Edinburg, Pennsylvania. It is essentially a dredging operation, bringing up sand and gravel to conveyors which move it onto the shore. From the shore it is moved by conveyor to the plant where it is processed and separated into various grades of sand and gravel and sold.

Corporate responsibility at Respondent's jobsite resides with Dale E. Schoeni, vice president, who also holds the position of executive vice president of Vanport Stone, Inc., and Alliance Land, Inc. All are separate corporate entities.

The work at the jobsite is performed by four employees. These are Phillip M. Fabich, leadman, Thomas Mitchell, dredge operator, Stephen Fabich, oiler,[2] and Leroy McFall, dumpster operator.

Fabich was first employed by Vanport Stone, February 26, 1968, where he worked until August of 1969 at which time he was drafted into the Army. When Fabich left the Army he was hired by Respondent on June 1, 1971, where he worked until he was discharged on February 8, 1982.

The employees of both Respondent and Vanport Stone are represented under a single labor agreement. The terms of the contract involved in this case ran from November 1, 1981, to October 31, 1982. Article V of the contract deals with vacations and provides for vacations with pay which depends on "years of continuous service."[3]

It appears that some employees had been accumulating unused paid vacation time over the years and Respondent, wishing to eliminate this carryover, calculated the amounts of vacation time due the employees with the view towards having that time used. In discussing the matter in November and December 1981,[4] it became apparent that Fabich and Schoeni disagreed about the amount of vacation time due to Fabich. Fabich took the position that his years of employment with Vanport Stone as well as his time in the Army should be added to his time with Respondent in computing "years of continuous service" for his vacation time. Schoeni did not agree, and construed Fabich's entitlement as limited solely to his post-Army years of employment with Respondent.

On December 15, Schoeni gave Fabich a gold watch commemorating 10 years of service with Respondent. Fabich rejected the gift. Fabich testified, "I told him that I didn't want it, I said, it took me almost 14 years to get a 10-year watch, either I didn't deserve it, or it was an insult."

On December 23, Schoeni showed Fabich written computations showing Schoeni's version of his accrued vacation. Fabich protested that the information being provided to him was incomplete since it went back only 10 years beginning with his employment by Respondent.

Fabich requested more complete information and on December 24 Schoeni showed Fabich what Fabich regarded as incomplete information carrying only the vacation days taken over the past 10 years. Fabich again protested that he was entitled to vacation time for the entire period beginning with his employment at Vanport Stone and including his Army time. Schoeni argued against such construction adding that no one was going to tell him how to run his business. During this conversation Schoeni told Fabich that his Christmas turkey[5] was on the back porch of the office.

Later in the day on December 24, Fabich and Schoeni met and spoke again at the scale house. At this time Schoeni told Fabich that he was giving him "off" until February 1. Fabich asked why, and Schoeni responded that he knew why and Fabich said that he did not.[6] Schoeni also reminded him of the turkey in the office. Fabich, whose testimony I credit, remarked that he intended to go to the union hall and file a grievance to which Schoeni responded "go ahead and file a grievance, he said, you or no human is going to tell me how to run a company." At noon on December 24, Fabich picked up the turkey, left it to spoil on the seat of Schoeni's pickup truck, and departed the premises. Fabich testified that he did this because he was angry that his vacation and seniority problem had not been resolved.

On December 28 Fabich went to the union hall where he discussed his seniority-vacation problem with Robert Session, business manager for the Union. Despite the fact that the contract has no grievance procedure in it, Fabich wrote out a grievance which Session mailed to Schoeni. The grievance read, "To Whom It May Concern. In March of 1968, I started my employment with Vanport Stone Company. In August of 1969, I entered the military service. I have lost approximatly 3 or 4

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[1] There is conflicting testimony regarding some allegations of the complaint. In resolving these conflicts I have taken into consideration the apparent interests of the witnesses. In addition, I have considered the inherent probabilities; the probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of the witnesses I rely specifically on their demeanor and have made my findings accordingly. While apart from considerations of demeanor I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco, Inc.*, 159 NLRB 1159 (1966).

[2] Stephen Fabich is the brother of Phillip Fabich, the alleged discriminatee.

[3] Sec. 1 of art. V "Vacations" reads:

> *Section 1.* Any employee by this Agreement shall receive one week vacation with pay after one year of continuous service. Any employee covered by this Agreement shall receive two (2) week's vacation with pay after three (3) years of continuous service. Any employee covered by this Agreement shall receive three (3) week's vacation after eight (8) years of continuous service. Any employee covered by this Agreement shall receive four (4) week's vacation with pay after twelve (12) years of continuous service. Vacations are to be scheduled so they do not interrupt operations of plant. Vacation shall be paid at the rate of pay at the time it was earned.

[4] All dates refer to 1981 or 1982 unless otherwise indicated.

[5] Christmas turkeys were an annual gift to employees from the Company.

[6] The time off was paid vacation for which Fabich was paid weekly by check during the time off, apparently pursuant to Schoeni's efforts to eliminate the accrued vacation time he calculated to be outstanding.

years seniority and I am filing this grievance to regain my seniority." The grievance was signed by Fabich.

On January 19, 1982, a meeting was held at the union hall to discuss the December 28 grievance. The meeting was attended by Fabich, Session, Union Business Agent Larry Pavrotta, and Schoeni. They discussed, but were unable to agree on, the seniority problem as it affected Fabich's vacation. Session testified that during the discussion Schoeni remarked that Fabich was going to have to change his attitude or he might not be back, or, according to Fabich, if he came back he might be replaced as leadman. While Schoeni denies saying that Fabich's attitude might affect his return to work on February 1, he conceded that he did remark that Fabich's attitude would have to change. In these circumstances, I credit the corroborated accounts of Session and Fabich to the extent that Schoeni indicated that Fabich's attitude might affect his employment status.

On February 1, Fabich returned to work and discovered that Mitchell had been performing work in his absence which he had normally done. On February 3, Fabich went to the union hall and discussed the matter with Session and wrote out the following grievance, "To Whom It May Concern at Vanport Stone & Vanport Sand and Gravel. I'm [Phillip M. Fabich] filing this grievance because I have been off work since December 24, '81. But I was not given a reason why. While I was off, you have had a man working at the stone plant and sand plant with less seniority than me. I'm qualify [sic] to do the job they were doing. I feel I should be paid for the time or days they worked." The grievance was signed by Fabich and mailed by Session to Schoeni.[7] In February 3 or 4, 1982, Session called Schoeni to discuss the seniority-vacation problem and Schoeni still maintained the same position. Failing to make any progress, Session said that he would take whatever proper steps were necessary.

Schoeni received the second grievance on Friday, February 5. On Monday, February 8, at the garage in the sand plant between 8 and 8:30 a.m., Schoeni appeared with the February 3 grievance in hand. Schoeni asked Fabich if he had seen this letter he got from the Union. Fabich identified it as the February 3 grievance and asked Schoeni what was he going to do about it. At this point Schoeni said, "[Y]ou're done, give me the keys," referring to the keys kept by Fabich to certain company property. Fabich asked why he was being fired, but Schoeni refused to provide a reason saying that he did not have to and "that's it." Fabich asked if it was because of the grievance and, according to Fabich, Schoeni shook the grievance in his face and said, "I will not tolerate this from no one, and he said, there's two other things that got to me, he said that watch I would not accept and the God damned, fucking turkey on the seat of my truck."

Schoeni conceded that he did not "spell out" to Fabich the reasons for his discharge although he did mention receiving the February 3 grievance, simply telling him that, "Mike, I've had all of this bullshit I can stand, I can't tolerate anymore. And he asked me what the reasons were, I said, Mike, you know the reasons, I said, I don't have to spell them out to you. I didn't want to get into a big argument. I'm not a good arguer, and I didn't wish to get into a great dispute there. I have made up my mind that this was what I was going to do." When asked to explain what he meant by "bullshit," Schoeni testified, "The way that he had acted and treated me, he lost a great deal of respect, I felt, for me, there toward the Fall of the year when I presented to him his vacation period and I had proved to him or tried to prove to him that it was correct, I wanted to make damn sure that it was correct, and he still denied that wasn't correct, that wasn't right and this irritates a person," adding that Fabich had been "very arrogrant and disrespectful" to his salesmen and people working at the plant.

About 9:30 a.m. on the same morning, Schoeni visited Vanport Stone where Fabich's father Phillip J. Fabich, a 22-year employee, was working. Schoeni engaged him in conversation saying, according to Fabich, "I've got something to tell you, he says, I fired Mike this morning and then he proceeded to talk and he says, you know, Mike refused that 10-year watch and I said, yes. He said, that was bad then he said that Mike had returned the turkey and the fruit cake that the Company give him for the holidays and he didn't like that, so he says, he received a letter in the mail indicating that Mike had turned in a grievance and he said, that's it, I had to fire him." This testimony is not disputed.

Session testified that later on the same morning of February 8, after being advised of the discharge, he called Schoeni: "I called Mr. Schoeni just to discuss the grievance and Mr. Schoeni informed me that he didn't have any problems with my predecessors and that he wasn't going to have those problems with me and that no one filed grievances against him and that he wouldn't tolerate this kind of stuff and that was it and that his attorney told him that he didn't have to answer to anyone the way that he run that plant or what he did with his employees." Schoeni testified, "He said that he was sorry to hear that I fired Mike, what did I fire him for and I told him that I told Mike he knew what, I didn't need to tell him the reasons cause he knew and I said, he's dissatisfied about his vacation period, I said, I'm sure this is what prompted a great deal of his dissatisfaction, commenting that, I said I learned a lot of things that went on before and—." To the extent that the conversations are at variance, I conclude that Session's version is more reliable than Schoeni's somewhat disjointed account and I credit it.

In testimony concerning Fabich's job performance, Schoeni testified that Fabich's attitude towards his work began to change in the summer of 1981 when Respondent changed over to a German make of hydraulic bucket for dredging, which involved substantial mechanical problems. Schoeni testified that Fabich lost interest in the changeover but conceded that he never discussed the

[7] Art. IX, Sec. I, of the contract provides, inter alia, "During slow periods and layoffs, seniority shall prevail at all times."

matter with Fabich.[8] Fabich denied this and testified that his willingness to work was not affected by the changeover. Schoeni also testified that Fabich would not wear a hardhat as required by state and Federal regulations. Fabich conceded this, but his undisputed testimony is to the effect that others did not wear hardhats and that he has never worn a hardhat and that he has agreed with Schoeni to pay any fine Schoeni might incur on that account.

Schoeni also testified that material was rejected by customers in September 1981 as not meeting their specifications and that it was Fabich's job to do periodic gradations of the materials so as to meet those specifications. While he discussed those problems with Fabich, Schoeni conceded that he took no disciplinary measure on that account. Fabich conceded that in certain instances the customer's specifications were not met, however, this was because it was not possible to make the material to the specifications requested because the blending and feeding machinery did not work properly. Fabich also testified, and I credit him in this regard, that he and Schoeni only discussed the problem and that Schoeni did not fault or criticize him.

Schoeni also testified that Fabich, when he returned to work on February 1, failed to perform various tasks assigned to him by Schoeni; however, Fabich, whose testimony I credit in this respect, testified that he either did what he was asked or was unable to do so because he lacked the proper equipment.

B. *Discussion and Analysis*

The General Counsel takes the position that Fabich was discharged because of the grievances he had filed concerning the contract dispute over his seniority-vacation entitlements and Respondent's use of a less senior employee on Fabich's job while he was laid off on paid vacation pursuant to Respondent's calculation as to the amount of paid vacation to which he was entitled.

Respondent first contends that Fabich's grievance filing activity was not "concerted" activity within the meaning of the Act since it was undertaken solely on his own behalf, not in concert with any other employee. Therefore, even assuming he was discharged for filing grievances, his discharge was not discriminatory under the Act.

Respondent further contends that, even assuming that Fabich's activities were "concerted," he was not discharged for the filing of grievances, but because of a change for the worse in his "attitude."

Turning first to Respondent's contention that the grievance filings were not concerted activities, Section 8(a)(1) of the Act provides inter alia that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" without interference by the employer. Respondent contends that the grievance filings were not "concerted," but were personal to Fabich and unrelated to the interests of any other employee.

However persuasive Respondent's argument may be in other forums, the current state of Board law, which I am obliged to follow, provides that even individual grievances filed to enforce a collective-bargaining agreement constitute protected concerted activity. In this case, while it is true that Fabich filed the grievances solely for his own benefit, they were nonetheless filed to enforce provisions of the existing collective-bargaining agreement and were thus protected within the meaning of the Act. The Board has consistently ruled that individual activity to enforce the provisions of an existing contract are essentially extentions of the concerted activity giving rise to the contract, and hence "concerted" within the meaning of the Act. *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967); *Roadway Express*, 217 NLRB 278 (1975). Nor is it controlling that there is no grievance procedure in the contract by which to obtain Respondent's adherence to the provisions of the contract. It is sufficient that the grievances relate directly to provisions of the contract even though the contract itself provides no method by which to enforce those provisions.

Respondent also arques that Fabich had no reasonable basis for filing the February 3 grievance. Even assuming that individual grievances filed to enforce a contract provision are protected concerted activity, Respondent contends that a reasonable basis for the grievance must exist as a prerequisite to any conclusion that a discharge for filing the grievance is discriminatory. However, in the instant case, where Fabich was protesting his layoff as being administered pursuant to erroneous calculations about his contractual seniority and the amount of vacation time to which he was entitled, the February 3 grievance dealing with the filling of his job during the disputed vacation paid layoff cannot be described as having no reasonable basis, whatever Fabich's prospects of winning that grievance. Such questionable merit does not privilege the employer to discharge for the filing of individual grievances under the contract. In summary, I conclude that there was a reasonable basis for the filing of both grievances and further that, even absent a finding that a reasonable basis existed for the filing of the grievances, the current state of Board law does not require that grievances be meritorious in order to constitute protected activity. *Interboro Contractors*, supra.

In a recent holding[9] a Board majority, in reviewing the precedent established in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), held that it was not unlawful to discharge a truckdriver for refusing to drive an unsafe truck after filing a complaint with state safety authorities since his action was individual and not "concerted activity" within the meaning of Section 7 of the Act. The Board further held that it was not in the *Meyers* case defining the parameters of the *Interboro* case and distinguished the two cases. In so doing the Board stated, "The focal point in *Interboro* was, and must be, the attempted implementation of a collective-bargaining agreement. By contrast, in the *Alleluia* situation, there is no bargaining agreement, much less any attempt to enforce one, and

[8] Mitchell, who was solicited by Schoeni in January 1982 to disclose any problems he may have had with Fabich, agreed that Fabich became less enthusiastic about the job about this time.

[9] *Meyers Industries*, 268 NLRB 493 (1984).

we distinguish the two cases on that basis."[10] The Board further noted, "The issue of the validity of the *Interboro* doctrine is presently pending before the Supreme Court. *City Disposal Systems*, 256 NLRB 451 (1981), enf. denied 683 F.2d 1005 (6th Cir. 1982), cert. granted 51 U.S.L.W. 3703 (U.S. Mar. 28, 1983) (No. 82-960)."[11] However, whatever implications the Supreme Court decision in *City Disposal Systems* may have, my responsibility is to apply existing Board law to the facts of the instant case, the disposition of which is still presently controlled by the *Interboro* decision.

Respondent further contends that, even assuming that the grievance filings were protected concerted activity, Fabich was not discharged for filing the grievances but rather because of, as set out in Respondent's brief, Fabich's "uncompromising and disagreeable attitude which finally really 'got to' Schoeni." The record, however, does not support that position.

The antagonism between Fabich and Schoeni has its beginnings in their disagreement over Fabich's seniority, specifically as it applied to Fabich's vacation entitlements. This matter was first discussed in November 1981 and frequently thereafter.

The problem became more defined on December 24 when Schoeni gave Fabich a written computation of vacation time which Fabich felt was incorrect and pursuant to which Schoeni told him he was being given off until February 1.[12] It was at this time that Fabich expressed his intention to file a grievance and Schoeni reacted by saying neither Fabich nor anyone was going to tell him how to run his business. In a meeting on January 19 to discuss the grievance Schoeni warned Fabich that he might not be back at all if his attitude did not change.

On Friday, February 5, shortly after he received the February 3 grievance, Schoeni consulted his superiors about discharging Fabich and did so on the morning of Monday, February 8. The circumstances of the discharge suggest an unlawful motivation. Thus, with grievance in hand, Schoeni told Fabich that he would not tolerate the filing of grievances anymore. Schoeni declined to tell Fabich why he was being discharged only saying that he had tolerated all the "bullshit" he could. In defining "bullshit" Schoeni conceded his irritation over, inter alia, Fabich's refusal to accept his computation on seniority and vacation.

That the grievances were the events precipitating the discharge is supported by the testimony of Fabich's father concerning his conversation with Schoeni on February 8, shortly after his son was discharged. A further suggestion of unlawful motivation is apparent in Session's telephone conversation with Schoeni later on the same day.

There are other elements, apart from the direct evidence of unlawful motivation set out above, which suggest a discriminatory motive for Fabich's discharge. Thus, Fabich was the leadman for the entire employee complement at Respondent's operation, the most senior and highest paid employee at the time of the discharge. In these circumstances, Fabich's discharge, without notice, without warning, without explanation, and without investigation, precipitously executed the next working day after receipt of the second grievance, persuades me, together with the other factors noted above, that Fabich's discharge was motivated by the filing of the grievances and was thus discriminatory.

Respondent advances yet another defense by arguing that the theory of the *Wright Line* case, and its progeny, should be applied to the instant case.[13] While Respondent denies that the General Counsel has made a prima facie showing to support the inference that the grievance filings were motivating factors in the decision to discharge Fabich, it argues that, even if such a prima facie showing has been made, Respondent has sustained its burden to demonstrate that Fabich would have been discharged even in the absence of the protected grievance filing activity. First, I am satisfied, based on the factors outlined above, that the General Counsel has made a prima facie showing of discrimination. In addition, a careful examination of this record convinces me that Respondent has not met its burden. While the record suggests that Schoeni may have been hurt or embarrassed by Fabich's rejection of the watch and Christmas turkey, the record will not support the conclusion that this ingratitude motivated Schoeni to discharge him. Nor will the record support the conclusion that he was discharged for any of the various shortcomings attributed to him by Schoeni. The incidents described by Schoeni were all essentially inconsequential or insignificant and certainly not sufficient to conclude that Fabich would have been discharged for those transgressions even in the absence of his protected concerted grievance filing activity.

In summary I conclude that Fabich's written protestations to enforce the contract motivated Schoeni to discharge him and that the discharge violated Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations as described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the

[10] Id. at 496.

[11] Id. at 496 fn. 21.

[12] Despite Fabich's testimony that he was not told why he was being given off, given the nature of the discussion, Fabich must have been aware that the layoff was to use up accrued paid vacation time.

[13] This case (251 NLRB 1083 (1980)) held that the Board, in evaluating employer motivation, was establishing a new test: "First we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place, even in the absence of the protected conduct." Id. at 1089.

Act. I have found that Respondent discharged Phillip M. Fabich in violation of Section 8(a)(1) of the Act and I therefore recommend that Respondent make him whole for any loss of pay which he may have suffered as a result of the discrimination practiced against him. The backpay provided herein with interest shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[14]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By unlawfully discharging Phillip M. Fabich Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
3. By interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and the entire record, I issue the following recommended[15]

ORDER

The Respondent, Vanport Sand and Gravel, Inc., Edinburg, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in regard to their hire or tenure in order to discourage concerted employee action regarding terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which I find necessary to effectuate the policies of the Act.

(a) Offer Phillip M. Fabich immediate and full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed and make him whole for any loss of pay he may have suffered in the manner set forth in the section of this decision entitled "The Remedy."

(b) Expunge from its files any reference to the discharge of Phillip M. Fabich and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as the basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Edinburg, Pennsylvania facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[14] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees in regard to their hire or tenure in order to discourage concerted employee action regarding terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer Phillip M. Fabich immediate and full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as the result of his unlawful discharge, plus interest.

WE WILL expunge from our files any references to the discharge of Phillip M. Fabich and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as the basis for future personnel action against him.

VANPORT SAND AND GRAVEL, INC.